FILED
JUN 7 1973
MICHAEL RODAK, JR., CL

IN THE

# Supreme Court of the United States

No. 72-1511

LARRY DICKINSON & GIBBS ADAMS,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF AMERICAN SOCIETY OF NEWSPAPER EDITORS AND SIGMA DELTA CHI, AMICI CURIAE

RICHARD M. SCHMIDT, JR.,
IAN D. VOLNER,

COHN AND MARKS
1920 L Street, N.W.
Washington, D.C. 20036
293-3860

*Attorneys for* American Society of Newspaper Editors and Sigma Delta Chi Amici Curiae

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

# Supreme Court of the United States

No.

LARRY DICKINSON & GIBBS ADAMS,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF AMERICAN SOCIETY OF NEWSPAPER EDITORS AND SIGMA DELTA CHI, AMICI CURIAE**

## INTRODUCTORY STATEMENT

The American Society of Newspaper Editors ("ASNE") and the National Professional Journalistic Society Sigma Delta Chi, with the consent of Petitioners Larry Dickinson and Gibbs Adams ("Petitioners") and of the United States ("Respondent")[1] hereby submit this joint brief as *amicus curiae* in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in this litigation.

[1] Copies of such letters of consent are set forth in the Appendix hereto.

ASNE and Sigma Delta Chi believe that the decision below, punishing as contempt the publication of a factual news account concerning a public proceeding in violation of a patently invalid order prohibiting such publication, will have a profoundly "chilling effect" upon the ability of journalists to report and the public to receive information of legitimate interest and concern. We have taken the unusual step of submitting this brief because we believe the issue presented on the Petition for Writ has far-reaching implications to the maintenance of a free, independent and effective press. It, therefore, urgently requires definitive determination by this Court.

## Interests of American Society of Newspaper Editors and Sigma Delta Chi

The ASNE is a nationwide professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, preamble) and the on-going responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Sigma Delta Chi is the society of students and practitioners of journalism. With more than 100 student chapters and more than 100 professional chapters, its 21,000 members include the most distinguished journalists in the United States.

In their professional capacities, members of the ASNE and Sigma Delta Chi are deeply concerned with any and

all attempts to impose restraints upon the publication of *bona fide* and factual news stories. The effects of direct ordinances and court orders prohibiting publication of *bona fide* news stories upon journalistic rights and duties under the First Amendment are readily apparent. Of equal concern to the members of ASNE and Sigma Delta Chi are attempts which, although indirect, have a "chilling effect" upon the publication of legitimate news accounts. Such indirect attempts at suppression or delay of publication, as well as outright prohibitions, threaten the ability of journalists to carry out their professional responsibilities. The ultimate victim in both instances is the public, whose right to a free flow of information is denied.

The issue *sub judice* is whether the reporting of a factual account of public proceedings in violation of a court order forbidding such publication is punishable as criminal contempt when the order is patently constitutionally invalid under the First Amendment. For the reasons hereinafter set forth, we believe that a policy of compelling newsmen to obey palpably invalid orders enjoining publication of news pending appellate judicial relief would severely delay the dissemination of information of legitimate public interest and concern. The impact upon the maintenance of an independent and effective free press resulting from such unwarranted and unconstitutional publication delays is, we submit, indistinguishable from that resulting from direct and outright imposition of prior restraints.

**The Requirement that Reporters Delay Publication of Factual News Accounts Pending Appeal of Patently Invalid Restraining Orders is Itself an Unconstitutional Prior Restraint**

The heart of the decision below is the conclusion that newsmen must comply with court injunctions prohibiting publication of factual news accounts pending "orderly review of the injunction in question . . . ." (*U.S. v. Dickinson*, 465 F.2d 496, 512 (1972)) even though the injunction ultimately is found to be constitutionally infirm. If the consequence of compliance pending appeal is the delay of publication of a news account, the Court reasoned, "newsmen are citizens too . . . . They too may sometimes have to wait." *Dickinson, supra*, at 512. It is this rationale which brings the decision below into irreconcilable conflict with the provision and purpose of the First Amendment: the Fifth Circuit Decision does not recognize the extent to which publication will be unavoidably delayed pending exhaustion of judicial remedies; and it does not perceive the destructive effect which even the slightest delays in publishing factual news accounts has upon the role of the press in our system of government.

1. Common experience establishes that the "speedy and effective, but *orderly* review" (*Dickinson, supra*, at 512) contemplated by the Court below will itself produce substantial delays in the reporting of events of genuine public concern. In *New York Times v. United States*, 403 U.S. 713 (1971), the news accounts at issue were of extraordinary nationwide interest. The parties and courts were unstinting in their efforts – to the extent of holding special weekend sessions and early morning hearings so that appeals could be heard the same day – to reach a swift final disposition. Yet, 13 days were consumed

between the time the case first entered the courts and its final determination. It simply cannot be assumed that all cases involving the issuance of injunctions restraining publication will be subject to the same efforts. In an extraordinary situation such as the *Times* case the newspaper may have reason to anticipate litigation and be prepared for it. In the more common situation, however, the injunction prohibiting reporting of a public event comes as a complete surprise to the newsmen; as, indeed, it did here. Time is unavoidably consumed in the preparation and filing of the legal papers, particularly in the case of small and rural publications which do not have vast legal staffs or law firms at their disposal. Difficulties may be encountered in the convocation of an emergency court, especially after hours and on weekends. And, throughout this entire process, under the rationale of the Court below, the presses must be stayed.

Moreover, the Court below seemingly conceives that the restraint of an invalid injunction would be lifted immediately upon a direct appeal. However, in some cases, because of the nature of the problem or for other reasons, the appellate court may find it necessary, or at least desirable, to remand the question of the validity of the injunction for explicit consideration by the trial court which issued it. This remand may, in turn, be followed by further appeals, Petitions for Rehearing by the government and, in some cases, stays pending certiorari or appeal to this Court.

2. The devastating effect which delays in publication engendered by obedience to palpably invalid censorship orders would have upon the role of the press in our system of government does not have to be left to speculation. In *Sun Co. of San Bernardino v. Superior Court*

*of San Bernardino County*, 29 Cal. App. 3rd 815 (1973), the trial court entered a censorship order prohibiting the local media from publishing certain information regarding a pending trial. Obeying the ban, the newspapers refrained from publication during the pendency of the appeal. By the time the injunction was overturned by an appeals court, the trial affected by the injunction had long since ended – in convictions of the accused. Plainly, whatever value the factual news accounts concerning the trial would have had, that value was utterly destroyed in the process of seeking to have the injunction overturned.

No useful purpose would be served by compiling additional illustrations of the effects of delay in the dissemination of information. The essential point is that the value of news accounts (with the arguable exception of certain in-depth investigative reports) is substantially diminished, if not entirely destroyed, by publication delays of even one day.

3. News, then, is a highly perishable commodity. Its timeliness must be preserved because of the central role played by the press in our representative system of government.

The function of the press is clear:

> A free press stands as one of the great interpretors between the government and the people.
>
> . . . . . .
>
> The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation

> than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

*Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). It is the press' function as an instrumentality of an "informed public opinion" which creates the need for immediate and unimpeded reporting of factual events concerning the activities of government by the press: the principles of control of the government by the people and accountability of government officials to the people vitally depend upon the immediate availability to the public of factual information concerning the activities of government. Thus, the public's right to receive, as well as the journalists' right to publish, information concerning the activities of government is imperiled by a requirement of restraint pending appellate review of censorship orders.

It is because of the role played by the press that prohibition against prior restraints of publication is absolute and virtually without qualification. The concept that protection against prior restraints is essential to the maintenance of a free press developed even before the promulgation of the First Amendment:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications . . . (Blackstone Commentaries on the Laws of England, Book 4, pp. 151-152 (Oxford: Clarendon Press 1765).)

That principle remains at the heart of the protection accorded by the First Amendment. And, the decisions of this Court leave no doubt that, insofar as the press and speech in general are concerned, the prohibition against prior restraints remains (as it began) absolute and without exception. See, *e.g., Near v. Minnesota, ex rel. Olson*, 283 U.S. 697 (1931); *Grosjean v. American Press, supra; New York Times v. Sullivan*, 376 U.S. 254 (1964); *New York Times v. United States, supra.*[2]

The decision below is in error because it creates an exception to the otherwise unqualified ban upon prior restraints. The Fifth Circuit's decision leaves a newsman with absolutely no choice: He must delay publication pending appellate review or face the virtual certainty that he will be punished for contempt, regardless of the validity of the underlying censorship order. The chilling effect of the Fifth Circuit's decision is thus to achieve indirectly what a direct and outright prior restraint achieves directly – it stops the presses. The decision below is therefore not only in conflict with the prior decisions of this Court and of other circuits, but also with the history and very purpose of the First Amendment.

---

[2] Arguably, special problems which may justify temporary restraints occur when the content of the story subjected to injunction vitally affects the national security. However, the overwhelming majority of injunctions prohibiting publication of public evidence and proceedings do not bear any relation to matters of national security. See, *e.g., State ex. rel. Supreme Court of Snohomish County v. Sperry*, 483 P.2d 608 (Sup. Ct. Washington 1971) (injunction limiting reporting with respect to criminal trial); *Wood v. Godson*, 485 SW 2d 213, Sup. Ct. Arkansas 1972 (same). Similarly, the issue whether prior restraints may be imposed upon the publication of materials which are arguably obscene has no relevance here. See Emerson, *The System of Freedom of Expression*, pp. 501-512.

4. In terms of impact on the ability of the press to effectively perform the functions assigned to it, a patently invalid injunction upon publication issued by a court stands on no different footing than a patently invalid ordinance restraining publication enacted by a legislature. Indeed, in a somewhat different context, this Court has noted that litigation, as well as legislation, can imperil the rights protected by the First Amendment. The Court has held it necessary to avoid "making vindication of freedom of expression await the outcome of protracted litigation." (*Dumbrowski v. Pfister*, 380 U.S. 479, 485 (1965).) Both come into conflict with the First Amendment because they have the identical effect of suppressing information to which the public is entitled.

A patently invalid injunction as well as an ordinance should, therefore, come before the Court "bearing a heavy presumption against . . . constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) Yet, the decision below distinguishes in a way which cannot be reconciled with the First Amendment between prior restraints imposed by the legislature and those imposed by a court. In so doing, the Court inverts the presumption of invalidity which attaches to "*any* system of prior restraints" (Bantam Books, *supra*, at 70; emphasis added): under the rationale of the decision below, a censorship order issued by a court (but not by a legislature) is presumed valid and must be obeyed until overturned on appeal.

This inversion of the burden of testing the constitutionality of restraints upon publication is wholly unnecessary to preserve an appropriate respect for the judiciary and judicial processes. The question is not whether newsmen have "the absolute right to decide with impunity whether

a Judge's order is to be obeyed . . ." as the Court below framed the issue. The question is only the manner in which the validity of such censorship orders is to be tested. If a newspaper elects to test an injunction restraining publication by violating it and, in subsequent contempt proceedings, the underlying injunction is found to be valid, we do not doubt that publication is properly punishable as criminal contempt, thus preserving the power and dignity of the judiciary. By the same token, the dignity and power of the court does not require punishment if the order is found invalid. In either event, the inherent authority and dignity of the court is preserved without disruption of the role of the press or infringement upon the terms or purposes of the First Amendment. It is only when reporters are punished – as they were in the present case – for contempt entirely without regard to the constitutionality of the underlying injunction that the court's efforts to preserve its dignity and respect have a "chilling effect" upon the exercise of First Amendment rights. Only such a result compels delay of publication pending appellate review. Only such a result upsets the proper balance between respect for the processes of law and the First Amendment.

## CONCLUSION

For these reasons we submit that the requirement of obedience to interim injunctions or orders prohibiting publication, pending reversal on appeal, is *ipso facto*, a prior restraint. See, *e.g.*, Freund, *The Supreme Court and Civil Liberties*, 4 Vanderbilt Law Rev. 533, 539 (1951). Since the consequences of such a restriction are intolerable, as we have shown, the principle enunciated by the Court below, we respectfully submit, cannot be allowed to stand. If, therefore, this Court does not summarily reverse the decision of the Fifth Circuit in the instant case, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD M. SCHMIDT, Jr.

IAN D. VOLNER

# APPENDIX A

Office of the Solicitor General
Washington, D.C. 20530

June 1, 1973

Ian D. Volner, Esq.
Cohn and Marks
1920 L Street, N.W.
Washington, D.C. 20036

Re: Dickinson and Adams v. United States
No. 72-1511, October Term, 1972

Dear Mr. Volner,

In response to the request in your letter of May 30, I hereby consent to your filing a brief amicus curiae in the above-captioned case on behalf of the American Society of Newspaper Editors and Sigma Delta Chi.

Very truly yours,

Erwin N. Griswold
Solicitor General

MARCUS COHN
LEONARD H. MARKS
PAUL DORIN
STANLEY S. NEUSTADT
STANLEY D. COHEN
RICHARD M. SCHMIDT, JR.
ROY F. PERKINS, JR.
MARTIN J. GAYNES
JOEL N. LEVY
ROBERT P. JACOBI
RONALD A. SIEGEL
ROY R. RUSSO
ALLAN J. KNOUR
WARENCE N. COHN
IAN D. VOLNER
RICHARD A. HELMICK

LAW OFFICES
COHN AND MARKS
1920 L STREET, N. W.
WASHINGTON, D. C. 20036

TELEPHONE
(202) 293-3860

CABLE ADDRESS
COMAR-WASHINGTON, D.C.

May 14, 1973

Ian D. Volner, Esq.
Cohn and Marks
1920 L Street, N. W.
Washington, D. C. 20036

Dear Mr. Volner

The undersigned is co-counsel for Larry Dickinson and Gibbs Adams, petitioners for a writ of certiorari in the Supreme Court.

On behalf of Mrssrs. Dickinson and Adams, I am delighted to accord you permission, as counsel for the American Society of Newspaper Editors, to file an amicus curiae brief on behalf of the American Society of Newspaper Editors, supporting the position of petitioners Dickinson and Adams.

Sincerely,

Martin J. Gaynes

# APPENDIX B

WASHINGTON, D.C. ss:

AFFIDAVIT

Ian D. Volner, being duly sworn, deposes and says:

1. I am one of the attorneys for the American Society of Newspaper Editors and Sigma Delta Chi, amici curiae in: Dickinson and Adams v. United States of America, Case No. 72-1511. I am a member of the Bar of the District of Columbia, but not of the Supreme Court.

2. I caused to be served the foregoing Brief in Support of Petition for Certiorari of American Society of Newspaper Editors and Sigma Delta Chi to be served upon the parties listed below by transmitting the same, postage prepaid, to such parties at the addresses specified below or as indicated by hand delivery thereof.

3. The parties upon whom the foregoing Brief was served are as follows:

(a) Leonard H. Marks, Esq.
Martin J. Gaynes, Esq.
Cohn and Marks*
1920 L Street, N.W.
Washington, D.C. 20036
Counsel for Larry Dickinson and Gibbs Adams

(b) Erwin N. Griswold
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

*By Hand

(c) E. Barrett Prettyman, Jr., Esq.
Robert R. Bruce, Esq.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Counsel for The Reporters Committee for Freedom of the Press

(d) Arthur B. Hanson, Esq.
John N. Fenrich, Jr., Esq.
888 17th Street, N.W.
Washington, D.C. 20006
Counsel for the American Newspaper Association

Respectfully submitted

Ian D. Volner

Subscribed and sworn to before
me this 6th day of June 1973

Notary Public

My Commission Expires: Sept 30, 1973